asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts a federal question has been presented via the Appellate Court's use of attitudinal factors in determining whether an individual is "qualified" as that term is used and defined under the applicable ADA regulations. However, the lower court's analysis is consistent with the definition of a disabled individual under the applicable ADA regulations and as such presents no conflict with the relevant decisions of this Court. When petitioner's argument is "defrocked" of its purported federal question allegations, all that has been argued is error in the lower court's receipt of additional evidence in light of a joint pre-trial statement of undisputed facts. This type of asserted error hardly presents a federal question reviewable by this Court. Nonetheless, respondent will address the petitioner's alleged instances of error.

Petitioner correctly cites the definition of a qualified individual under the ADA but then proceeds to ignore it in his argument for review.

The ADA defines a "qualified individual" as:

> An individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position.

29 C.F.R. Sec. 1630.2(m); *see also* 42 U.S.C. Sec. 12111(8).

As held by the lower courts in this case it is axiomatic that a good attitude is a requirement of any job, together

with the acceptance of supervision, the ability to refrain from defying and mocking one's supervisors and the ability to get along with fellow workers. (All of which are arguably subsumed within the "good attitude" characteristic.)

The court observed in *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 14 A.D.D. 100, (N.D. Ill. 1996), *judgment aff'd in part on other grounds, rev'd in part on other grounds*, 104 F.3d 1004, (7th Cir. 1997), that acceptance of supervision is an essential job function and that the employee's inability to do so prevented her qualified individual status under the ADA.

In addition, several Courts have espoused the view that the ability to get along with others in the workplace constitutes an essential job function, and that an employee who cannot do so is not a qualified individual with a disability under ADA Title I. The court in *Palmer v. Circuit Court of Cook County, Social Service Dept.*, 905 F. Supp. 499 (N.D. Ill. 1995), *aff'd*, 117 F.3d 351 (7th Cir. 1997), observed that a person who displays abusive and threatening conduct toward co-workers is not a qualified individual with disability within the meaning of 42 U.S.C.A. § 12111(8), since the essential functions of any job include the avoidance of such behavior. Acknowledging that the ability to maintain a non-combative atmosphere in the workplace, that is, to interact peacefully with supervisors, other employees and customers, is an essential job function, the court in *Hardy v. Sears, Roebuck and Co.*, 23 A.D.D. 1208 (N.D. Ga. 1996), said that abusive and threatening behavior directed by an employee toward co-workers and customers may dictate that the employee cannot perform the essential functions of a given job, and thus is not a qualified individual with a disability within the meaning of 42 U.S.C.A. § 12111(8), if the disruption caused by such

behavior is substantial. And in *Weigert v. Georgetown University*, 120 F. Supp. 2d 1 (D.D.C. 2000), a university research assistant failed to establish that she was a "qualified individual with a disability" within the meaning of Americans with Disabilities Act (ADA) since there was no accommodation that the university or its employees could have instituted to control research assistant's consumption of medication that would have permitted her to perform the essential function of compatibly interacting with her co-workers and supervisors. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C. § 12111(8).

Petitioner does not go so far as to state that an employer could not require a good attitude as an essential job function but states that because the parties entered into a joint pre-trial statement setting forth various uncontested facts including the uncontested essential functions of Petitioner's employment position and, further, as "good attitude" was not specifically listed as an essential function, the court erred in considering Petitioner's attitude in determining whether he was a qualified individual. This is an untenable argument.

First, there is absolutely nothing in the Joint Pre-Trial Statement which indicates that it was ever meant to be exclusive of any other evidence. (App. 134-141) Secondly, pursuant to Petitioner's argument, Respondent could have proven at trial that Petitioner showed up drunk every day and assaulted his co-workers but this evidence should have been inadmissible because showing up sober and not assaulting one's co-workers was not listed as an essential function. As earlier stated this position defies common sense and exemplifies the argument's failure.

An essential function of a job may be established, for purposes of ADA claim, by evidence that includes: (1) the employer's judgment as to which functions are essential, (2) written job descriptions prepared before advertising or interviewing applicants for the job, (3) the amount of time spent on the job performing the function, (4) the consequences of not requiring the incumbent to perform the function, and (5) the current work experience of incumbents in similar jobs. Americans with Disabilities Act of 1990, §§ 2 et seq., 42 U.S.C. §§ 12101 et seq. *Meyer v. Iowa Mold Tooling Co., Inc.*, 141 F. Supp. 2d 973 (N.D. Iowa 2001). Likewise, citing 29 C.F.R. § 1630.2(n)(3), the court observed in *Harden v. Delta Air Lines, Inc.*, 900 F. Supp. 493 (S.D. Ga. 1995), that evidence whether a particular job function is essential includes the consequences of not requiring the incumbent to perform the function. The court noted in *Kalekiristos v. CTF Hotel Management Corp.*, 958 F. Supp. 641 (D.D.C. 1997), *aff'd without op*, 132 F.3d 1481 (D.C. Cir. 1997), that relevant evidence whether a particular job function is essential, and therefore must be performable in order for an individual to be a qualified individual with a disability under ADA Title I, includes the consequences of not requiring that the function be performed. The consequences of any non-disabled individual displaying the attitude which Petitioner employed would have been termination.

In sum, Petitioner's allegations of federal question issues are really nothing other than allegations of evidentiary error and those arguments fail as well. There is simply nothing which would warrant this Court's review under federal question jurisdiction.

II. There Is No Substantive Conflict Among The Circuits Regarding An Employer's Obligation To Engage In An Interactive Process.

"[T]he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below." Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L.Rev. 717, 726 (1993) (*quoting* H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)). However, while the Circuits may appear to be semantically split on the issue of when the interactive process is triggered when a disabled individual requests or needs accommodation, upon a substantive review of these decisions no actual conflict has been presented.[1]

A. The Circuits Are Not Split In Finding No Independent Liability For An Employer's Failure To Engage An Interactive Process.

First, if this Court agrees that Petitioner was not a qualified individual for purposes of the ADA there is no need to address an employer's obligation to engage in the interactive process as held by the Appellate Court (App. 27, fn. 10.).

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[1] A thorough and invaluable analysis of circuit rulings relative to the issue of a required interactive process is found in John R. Autry, Note, *Reasonable Accommodation Under The ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" But the Law Says "No"*, 79 Chi-Kent L.Rev. 665 (2004). The author states Supreme Court review would be helpful due to the purported split among the circuits but goes on to assert his hypothesis that the Court may be refusing to take these cases as in reality there is no split.

Even assuming an interactive process is required under the ADA and further assuming an employer fails to engage in such a process, no Circuit has found independent liability for the employer's failure to do so when presented with an unqualified individual. In other words, if an employee is not a qualified individual under the ADA it is of no consequence whether the interactive process was employed or not. There is no split among the Circuits on this issue. *See Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001) quoting *Soto-Ocasio v. Fed. Exp. Corp.*, 150 F.3d 14, 19 (1st Cir. 1998) (where the employer failed to engage in the interactive process such an omission is of no moment if the record forecloses a finding that the plaintiff could perform the duties of the job, with or without a reasonable accommodation); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1005, 1136 (9th Cir. 2000) (employers who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute [only] if a reasonable accommodation would have been possible); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000) citing *Beck v. Univ. of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996) (when assigning ADA liability to employers it is insufficient for plaintiffs to show that the employer simply failed to engage in the interactive process). An employer is not liable under the Act even where it refuses to interact unless its refusal also leads to a failure to accommodate and a reasonable accommodation was available to render the plaintiff statutorily qualified Autry, *supra* at 689.

B. There Is No Substantive Circuit Split Even In Cases Dealing With The Interactive Process And Qualified Individuals.

In addition, and despite Petitioner's assertions, Respondent respectfully submits that no actual split among the circuits exist when dealing with the interactive process and qualified individuals. Although many Courts and commentaries have stated a split exists, upon review and actual application, the split is only semantic and not operational in nature.

For example, most Circuits profess to "require" employers to engage in the interactive process when presented with qualified individuals. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999), *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996). Two hold that employers are not required to do so, *White v. York International Corp.*, 45 F.3d 357 (10th Cir. 1995), *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), and two others evaluate interactive process liability on the facts of each case, *Jacques v. Clean-up Group., Inc.*, 96 F.3d 506 (1st Cir. 1996), *Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999), Autry, *supra* at 677-84. However,

> Courts that require employers to interact contend that they are assigning ADA liability for a failure to engage in the [interactive] process. On closer inspection, however this contention is manifestly false . . . the court looks for evidence of appropriate accommodations that the defendant failed to discover when it did not interact. The key to liability, then, is the defendant's failure to implement one of the available appropriate accommodations, *not* the failure to interact with the plaintiff . . . .

> There is, then, no situation (and no Circuit) in which an employer is *required* by law to engage in the interactive process. Liability only attaches under the ADA if the employer fails to reasonably accommodate the limitations of an employee's disability . . . If the employee has been reasonably accommodated, ADA liability cannot attach, regardless of whether the accommodation was produced without employee input. Thus, those Courts that recognize an interactive process participation requirement are fooling themselves and their litigants, the ADA, as currently drafted, permits no such requirement.

Autry, *Id.* at 690-91 (cites omitted).

In this case, Petitioner presented no evidence of any reasonable accommodation Respondent could have implemented which would have allowed him to do the essential functions of his job. As such Respondent has no ADA liability regardless of whether an interactive process was employed or not.

CONCLUSION

Petitioner's claims of potential damage to the spirit, intent and plain language of the ADA as a result of the lower courts' rulings are unfounded. It was never the intent of the ADA to guaranty the employment of disabled individuals regardless of their attitude and work ethic. Disabled individuals must still be able to perform the essential functions of a job and it is axiomatic that an acceptable, if not good, work attitude and ethic is an essential function of any job, whether the employee be

disabled or not. These matters hardly present issues of federal question jurisdiction.

Secondly, there is no split of authority in the Circuits regarding an employer's interactive process duties and non-qualified individuals – the only issue presented by this case. However, even if the Court expands its review to those cases involving qualified individuals there is no substantive conflict in the Circuits below.

As such, Respondent respectfully requests the Petition For A Writ Of Certiorari be denied.

Dated this 24th day of October, 2005.

Respectfully submitted,

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